CORE
Metadata, citation and similar papers at core.ac.uk
Provided by UC Hastings Scholarship Repository (University of California, Hastings College of the Law)

Hastings Law Journal

Volume 23 | Issue 4 Article 9

1-1972

The Scope of Affirmative Relief under Title VII: United States v. Iron Workers Local 86

John B. Weldon Jr.

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

John B. Weldon Jr., *The Scope of Affirmative Relief under Title VII: United States v. Iron Workers Local 86*, 23 Hastings L.J. 1263 (1972).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol23/iss4/9

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

THE SCOPE OF AFFIRMATIVE RELIEF UNDER TITLE VII: UNITED STATES v. IRON WORKERS LOCAL 86

During the past sixty years organized labor has developed into one of the most powerful political and economic groups in our society. Their power has been utilized to produce many desirable advantages for the workers including higher wages, shorter work weeks, medical and dental plans, paid vacations, and retirement benefits. In order to obtain these advantages, the unions have had to gain substantial control over the skilled crafts and trades necessary for the maintenance of America's industrial production. Once having acquired such control, it is only by restricting the number of skilled workers in the crafts and by obtaining iron-clad collective bargaining agreements with employers that the unions have been able to sustain the high wage levels for their membership.[1]

Admittance to unions has been restricted primarily through exclusionary devices such as strict limitations on the maximum size of the union, nepotistic recruitment policies which heavily favor friends and relatives of present union members, and membership qualification criteria which tend to discriminate against minority groups.[2] Long ini-

1. *See* Comment, *Title VII of the Civil Rights Act of 1964 and Minority Group Entry into the Building Trade Unions*, 37 U. CHI. L. REV. 328 (1970).

2. In addition, there are other practices which act as barriers to minority group entry into the building trades, *e.g.*, lack of information about job opportunities and fear of rejection by the unions. "Passive union recruitment policies usually result in information about openings in the building trades reaching only the close friends or relatives of present union members. Since few union members are members of minority groups, little information about these [openings filters down into the black community]." *Id.* at 331 & n.23. When such information does reach prospective applicants they often fail to pursue the opportunity due to the union's reputation in the black community for rejecting or discouraging majority applicants. *Id.* at 351. If, despite the lack of information and the hostility toward minorities, a black does apply, many of the criteria presently used for admission to the union and its programs tend to discriminate against members of minority groups. For example, blacks who do file applications may be overwhelmed by a multitude of forms or harassed by processing delays that allegedly result from misplaced or lost forms. Aptitude tests also provide ample opportunity for discrimination, either in content, administration, or grading. Equal treatment can also be denied through discriminatory initiation fees and through internal rules that require nomination of an applicant by a member and almost unanimous approval of the membership. Furthermore, since in most cases preference is given to the relatives and friends of union members, the effect of prior discrimination is perpetuated. Written and oral tests given to the applicant have

tial training periods at relatively low wages, subjective standards for admission, and a narrow age range for acceptable applicants further discourage and sometimes even prevent admittance to union programs.[3] Moreover, union bargaining agreements generally provide that the employer will rely on the union's hiring hall as his sole source of labor, and also that referrals of employees by the union will be determined according to priority based on previous work experience under a union contract.[4] Consequently, union members regularly receive preference over nonunion members under the referral system, and only in periods of relatively active employment are nonunion laborers given any work.[5]

---

proven fertile ground for discrimination by the unions. Such tests have generally been entirely subjective and the grader has a great deal of personal discretion which is not subject to review. *Id.* at 348-49. Also the journeyman's examination has often been completely unrelated to the skills and knowledge necessary for job performance. Another form of discrimination is practiced by restricting union membership size. While it is true that these restrictions exclude whites as well as blacks, these policies tend to perpetuate the effects of prior discrimination and thus have the practical effect of excluding blacks from union membership. *Id.* at 356.

3. The normal period of indenture for an apprentice in the building trades ranges from four to five years with the pay scale considerably below that of a journeyman. In the past, the unions have required qualified nonunion blacks to go through the long apprenticeship program at low pay despite the fact that the man possessed the necessary skills to pass a fair journeyman's examination. Such practices reduce the opportunities of blacks with some skills or experience to enter laterally from nonunion work either as advanced trainees or journeymen. The objective requirements for membership in the union, such as the possession of a high school diploma or the passage of an intelligence test, are also less likely to be met by young blacks than by young whites. The narrow age limits established for new members usually range in the neighborhood of seventeen to twenty-three years which discourages the older, more highly motivated blacks from entering the program. *See* Hain, *Black Workers Versus White Unions: Alternate Strategies in the Construction Industry*, 16 WAYNE L. REV. 37 (1969).

4. Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516, 518 (1968).

5. The job referral practices followed by the unions typically rely on four categories of priority. The highest priority category requires four years experience in the trade, passage of a journeyman's examination, union membership, residence in the jurisdiction of the local, and at least one year of experience under a union contract. The next priority would be given to nonresident members of another local who have passed a journeyman's examination and who have worked in the trade for four years. The third priority is given to those with three years experience in the trade, six months of which was obtained while working under a union contract, and residence in the jurisdiction of the local. The largest number of nonmember workers seeking referral through the hiring hall are in this third priority category. The lowest priority group is for those who have merely worked in the trade for at least one year. Blacks, having been discriminated against in the past under the referral system, tend to remain in this lowest priority group which tends to discourage them from relying on the hiring hall for a job and forces them to seek employment as a nonunion laborer with its lower wages and fewer benefits. By limiting the present employment opportunities, the seniority standards used for job referral prevent the black worker

This means that minority personnel who cannot gain union membership are often severely limited in employment opportunities. Furthermore, the seniority standards used for job referrals by the union prevent the accumulation of seniority for future employment opportunities.

The exclusion of minorities from the labor union is more consequential in the craft unions where employment is traditionally seasonal. Since employers are generally unable to utilize a permanent labor force, the employee in a craft union must rely almost solely on his position within the union structure for security.[6] Because of this dependence upon the union for job security, craft unions tend to become tight-knit and united against outsider interference. The workers perceive it to be in their immediate short-run interest to minimize the competition for jobs by limiting the supply of qualified laborers and to establish criteria for selection, retention, and referral that would benefit themselves without necessarily benefiting the employer or the industry.[7] Recently, the effort to provide more job opportunities for minorities has been viewed, perhaps with some justification, as a vital threat to the job security of the craft union members.

Although state laws had begun to eliminate discrimination against minority groups, it became increasingly clear by the early Sixties that progress had been too slow and that national legislation was needed to meet a national problem.[8] As a result, federal legislation was enacted which sought in part[9] to eliminate persistent discrimination in employment opportunities by providing broad effective remedial relief for denials of equal protection of the laws on account of race, color, religion, sex, or national origin.[10]

---

from ever accumulating sufficient seniority for future employment opportunities. *See* Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions*, 16 ST. JOHN'S L. REV. 58, 60-64 (1954).

6. Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516, 518 (1968):

7. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 251 (1971) [hereinafter cited as Fiss].

8. H.R. REP. No. 914, 88th Cong., 1st Sess., Part 1, at 18 (1963). "That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. . . . [The act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope."

9. Title VII, §§ 701-16, 42 U.S.C. §§ 2000e-12 (1970). Title VII of the act deals with equal employment opportunities.

10. The legislation also sought to eliminate discrimination in exercising the right to vote, in gaining access to public facilities, in the receipt of federal financial assistance, in the availability of public education, and in the area of obtaining adequate housing.

In the specific area of unionized labor, sections 703(c)[11] and (d)[12] of the 1964 Civil Rights Act declared it to be an unlawful employment practice for a labor organization, within the purview of the act, to discriminate either in membership requirements, employment referrals or union training programs, on the basis of race, color, religion, sex, or national origin. Section 706(g)[13] authorized broad judicial relief, including "such affirmative relief as may be appropriate," to alleviate unlawful discriminatory practices. Section 703(j) of the act also restricted the courts' power by providing that no labor organization can be required to grant preferential treatment to any individual or group of individuals because of their race, color, religion, sex, or national origin, or because there may be an imbalance between the composition of the community and the membership in a particular labor organization.[14] In addition to individual actions brought under the act, the attorney general, under section 707(a),[15] can institute suits to obtain relief from the discriminatory practices of a particular

11. The provisions of Title VII are not limited to acts of discrimination by labor unions and their apprenticeship programs. Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1970), prohibits discrimination based on race, color, religion, sex, or national origin by employers and section 703(b), 42 U.S.C. § 2000e-2(b) (1970), makes unlawful such discrimination by employment agencies. The relief provisions of the act likewise apply to employers and employment agencies. *Id.* § 703(c)-(d), 42 U.S.C. §§ 2000e-2(c)-(d) (1970), provide:

"(c) It shall be an unlawful employment practice for a labor organization—

"(1) to exclude . . . or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

"(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities . . . or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin."

12. *Id.* § 703(d), 42 U.S.C. § 2000e-2(d) (1970), makes it an unlawful employment practice for an employer, union, or joint labor-management committee to discriminate due to race, color, religion, sex, or national origin in its apprenticeship or training program.

13. *Id.* § 706(g), 42 U.S.C. § 2000e-5(g) (1970), provides that if the court finds that the union or employer has intentionally discriminated against an individual or group, the court can enjoin such discrimination and order whatever affirmative relief is appropriate under the circumstances.

14. *Id.* § 703(j), 42 U.S.C. § 2000e-2(j) prevents any labor organization or employer from granting preferential treatment to an individual or group because of an imbalance in the racial, religious, sexual, or ethnic composition between such organization or employer and the community.

15. *Id.* § 707(a), 42 U.S.C. § 2000e-6(a), allows the attorney general to bring a civil action against any person or group of persons engaging in a pattern or practice of discrimination, and to request appropriate relief, including an application for a permanent or temporary injunction, restraining order, or any other order that the attorney general deems necessary to protect the rights guaranteed under the act.

employer or union when there is a "pattern or practice of resistance to the rights" secured by the act, or when the pattern or practice "is intended to deny the full exercise of the rights herein described."

In an effort to implement the provisions of the act, the courts have been quite liberal in granting relief. Past decisions have ordered the merger of unions,[16] implementation of new seniority systems,[17] publication of new nondiscriminatory union policies,[18] development of objective criteria for union membership,[19] and revamping of apprenticeship programs.[20] The courts have also granted specific relief to individuals by ordering the union to immediately refer such individuals to existing jobs.[21] However, the ordering of such affirmative relief by the courts has not been without criticism. The critics claim that the mere availability of such relief has provided the courts with the means to "meddle" in the internal affairs of the unions and that certain relief ordered by the courts has allowed racial preferences and imposed racial quotas on the unions in violation of 703(j).

The Ninth Circuit significantly expanded the type of affirmative relief granted under the act in a recent case, *United States v. Ironworkers Local 86*.[22] The action was brought against the labor union to eradicate alleged vestiges of past discriminatory practices, and the court affirmed the lower court's order creating "special" apprenticeship classes for blacks and establishing "minimum levels of participation" by blacks in the regular apprenticeship programs conducted by the unions involved.

This note will examine the affirmative relief ordered by the court in terms of the statutory authority contained in the relief provisions found in Title VII and the policy underlying the 1964 Civil Rights Act eliminating all forms of discrimination in our society. The note will conclude that the Ninth Circuit may have over-reached its power by establishing "minimum levels of participation" by blacks.

Background: The Development of Case Law Under Title VII

When the original bill for the 1964 Civil Rights Act was intro-

16. United States v. International Longshoreman's Ass'n, 319 F. Supp. 737 (D. Md. 1970).

17. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

18. United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

19. Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

20. United States v. Plumbers & Pipefitters Local 73, 314 F. Supp. 160 (S.D. Ind. 1969).

21. *Id.*; Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

22. 443 F.2d 544 (9th Cir. 1971).

duced before Congress, it was regarded as a drastic step and Title VII—which was part of the original bill—was no exception. The provisions of Title VII gave rise to cries that employers and labor organizations would be yoked with "racial quotas" and would be forced to give "preferences" to minority groups in order to escape the threat of federal prosecution.[23] The fears of "racial quotas" were somewhat quieted by the fact that the act itself prohibited any form of discrimination in hiring, including "reverse discrimination."[24] In order to put such fears permanently to rest, Senator Allott of Colorado proposed an amendment to Title VII, later adopted as section 703(j), for the specific purpose of providing that no unlawful employment practice would be founded solely on the basis of racial imbalances.[25]

In the original wording of Title VII, the Equal Employment Op-

23. Under Title VII, § 707(a), 42 U.S.C. § 2000e-6(a) (1970), when a labor organization is engaged in a pattern or practice of discrimination the attorney general can bring a civil action in order to stop such discrimination. See note 15 *supra.*

24. "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

"That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey).

"Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in membership and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. . . . But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring." *Id.* at 6563 (remarks of Senator Kuchel).

25. Senator Allott of Colorado offered 703(j) as an amendment in its initial form on May 4, 1964. Senator Allott introduced his amendment with the following statement:

"Mr. President, I have heard over and over again in the last few weeks the charge that title VII, the equal employment opportunity section, would impose a quota system on employers and labor unions. . . . [The argument] is that an employer will hire members of minority groups, regardless of their qualifications, to avoid having any problems with the Equal Employment Opportunity Commission. . . .

"I do not believe title VII would result in . . . a quota system. . . .

"But the argument has been made and I know that employers are . . . concerned with the argument. I have, therefore, prepared an amendment which I believe makes it clear that no quota system will be imposed if title VII becomes law. Very briefly, it provides that no finding of unlawful employment practice may be made solely on the basis of racial imbalances." *Id.* at 9881.

portunity Commission (EEOC) not only had the authority to conduct investigations, but also to institute hearing procedures and issue cease-and-desist orders. However, members of the Senate Judiciary Committee preferred that the courts and not the EEOC have the final determination if the discrimination claim was disputed. The committee reasoned that the investiture of the district courts with such power would encourage more rapid settlement of the complaints. Furthermore, the employer or labor union would have a more just forum since a trial de novo would be required in district court proceedings which would necessitate proof of discrimination by a preponderance of the evidence. The EEOC was intended to confine its activities to correcting abuses, short of imposing forced racial balances upon the unions or employers. The internal affairs, management perogatives, and union freedoms were to be left undisturbed to the greatest extent possible. Still, opportunities for employment were not to be obstructed due to racial prejudices and membership in unions or jobs with companies were to be filled on the basis of nondiscriminatory qualifications.

In marked contrast to the limitations imposed on the relief which could be given by the EEOC, the judicial interpretations of the relief provisions of Title VII have been quite liberal. In several cases prior to *United States v. Ironworkers Local 86*,[26] the courts have granted various types of affirmative relief. The courts, under essentially identical factual situations, have progressively broadened the scope of affirmative relief with no indication as to what would constitute the outer limits of the courts' power under Title VII. In order to provide some insight of the significance of the unique relief granted by the Ninth Circuit in *Local 86*, the types of affirmative relief ordered by the courts in earlier cases will be discussed in terms of the statutory relief provisions under Title VII.[27]

Many of the cases[28] which have interpreted and integrated the

26. 443 F.2d 544 (9th Cir.), *cert. denied*, 92 S. Ct. 447 (1971).

27. See notes 11-15 & accompanying text *supra*.

28. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (usage of intelligence tests as a condition of employment); United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970) (modification of referral system); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (suspension of seniority system); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) (publication of the fact that membership and related benefits were open to all persons and an affirmative duty of minority recruitment); United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969) (changing seniority systems); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (striking down nepotism membership requirement); United States v. Plumbers & Pipefitters Local 73, 314 F. Supp. 160 (S.D. Ind. 1969) (revamping apprenticeship programs); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968) (suspended operation of referral system).

provisions of Title VII into an effective means of eliminating discrimination cite approvingly the language of the Supreme Court in *Louisiana v. United States*[29] in which the Court declared:

> the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[30]

This statement has been referred to repeatedly by the courts in order to establish a foundation upon which to base the affirmative relief granted under Title VII.[31]

Dobbins v. Electrical Workers Local 212,[32] decided in 1968, was one of the first cases under Title VII to reach the district court level. The district judge cited the language of the Supreme Court in *Louisiana* and declared that the court was obligated to utilize the full and lasting resources of equity in granting specific remedial relief to insure blacks the full enjoyment of the right to an equal opportunity in employment. The court held that if affirmative relief was necessary in order to correct the effects of prior patterns and practices of discrimination then such relief was both necessary and proper.[33] In its findings of discrimination the court noted that the union had denied blacks union membership, job referrals, and other employment opportunities because of their race or color. The court further found that the union had discriminated against the blacks by giving priority in work referrals to persons who had work experience under a collective bargaining agreement and at the same time denying blacks the opportunity to gain such experience. In addition, the union had applied different membership standards to specific individuals.[34] The court, however, carefully rejected the contention that Title VII *required* a union to take affirmative action to relieve the present-day result of pre-act discrimination, because such action would constitute the granting of

29. 380 U.S. 145 (1965). This was an action brought under the 1957 Civil Rights Act and the Fourteenth and Fifteenth Amendments seeking to have an interpretation and citizenship test which was a prerequisite for voter registration set aside. Since *Louisiana* did involve racial discrimination in voter registration, the courts have in actions brought under Title VII relied on the general policy declared in *Louisiana* that the courts must correct the effects of past discrimination as well as bar future discriminatory acts. This language has provided a guideline in Title VII cases as to the desired federal policy behind the 1964 Civil Rights Act if racial discrimination and its badges are to be eliminated from our society.

30. 380 U.S. 145, 154 (1965).

31. *See, e.g.*, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

32. 292 F. Supp. 413 (S.D. Ohio 1968).

33. *Id.* at 447.

34. *Id.* at 443, 446. See notes 2-3 *supra*.

preferential treatment in violation of section 703(j).[35] Since the government had failed to show that the alleged discrimination involved a significant number of people, the court refused to strike down the entire referral system, and instead, temporarily suspended the existing referral system until a new system could be developed which would eliminate the distinctions based on union membership, journeymen's examinations, or work experience under a union contract.[36]

In discussing the type of relief available, the court held that the newly enacted civil rights act did not apply retroactively. The only acts of discrimination or effects of past discrimination which could be remedied under the act were those that occurred after July 2, 1965. Although in general agreement with the rationale of *Louisiana*, the court considered itself limited by the express language of Title VII and refused to grant any type of affirmative relief not specifically provided in the act itself.[37] Even though the court recognized it had broad equitable powers to grant relief under the rationale of the Supreme Court in *Louisiana*, it felt constrained to grant only prospective relief which would comply with the prohibitions against the granting of preferences contained in 703(j).

An additional significant point contained in *Dobbins* was the fact that the district court premised its decision on a careful review of both the legislative debates and the provisions of the act, an approach which has not been followed generally by the appellate courts in later cases involving Title VII.[38] For example, in two later cases[39] the Fifth Circuit Court of Appeals refused to follow the restrictive view of *Dobbins* and instead broadened the type of relief available under Title VII.

35. *Id.* at 444. In reaching this conclusion, the court relied on the discussion of Senators Dirksen, Humphrey, and Clark in the Senate during the debate on the act to support its holding that Title VII does not require an employer union to give any minority group preferential treatment on account of a racial imbalance. See note 24 *supra.*

36. *Id.* at 453.

37. "[The union] is not required to run a school to advance the skill of any group discriminated against prior to July, 1965; it is not required to seek out individuals in that group who may be competent for referral . . . and that even though membership or referral has been discriminatorily denied prior to the Act." *Id.* at 445. The court also stated that there was nothing in Title VII which required the union to publicize its policies either generally or to the black community specifically with regard to admission or job referrals. The court's conclusion was based primarily on the finding that the union had discontinued its discriminatory practices prior to the date the act became effective.

38. *See, e.g.*, Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

39. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

The first case, *Local 53, Asbestos Workers v. Vogler*,[40] was an action challenging the union's nepotistic practice of limiting membership to sons or relatives of present members. The court held that the union's policies regarding membership and job referrals discriminated on the basis of race and national origin.[41] In formulating the relief to be granted, the Fifth Circuit declared, "the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate.' "[42] The court rejected the union's contention that the order of the lower court which required the admission of four individuals into the union and the referral of nine others to available jobs constituted preferential racial treatment or the establishment of a quota system.[43] In addition, the court held that if found necessary to insure compliance with the act, the district court was also empowered to eliminate any vestiges of *past* discrimination.[44] The court rejected the union's assertion that the order penalized it for pre-act discrimination and stated that by eliminating membership policies which served no significant trade-related purpose, and which had originally been instituted—at least in part because of a racially discriminatory attitude—and which in fact resulted in the exclusion of blacks, the order was merely aimed at preventing *future* acts of discrimination. By thus interpreting the order as a prevention of future discrimination, the court circumvented the relief limitations set forth in section 703(j). The court reasoned that even though the union's practice of limiting membership to sons or relatives of present members would have applied equally to whites as well as blacks, the fact that there were no Negro or Mexican-American members in the union would have precluded the future admission of such members. In summary, the court utilized Title VII to eradicate a type of discrimination which was not strictly based on race or national origin but rather on lineage or friendship. In contrast to *Dobbins*, *Vogler* stands for the proposition that the granting of affirmative relief is appropriate under Title VII to correct the effects of *past* discrimination. The court thus rejected the views expressed in *Dobbins*, and later cases have relied on the reasoning expressed in *Vogler*

40. 407 F.2d 1047 (5th Cir. 1969).

41. *Id.* at 1050. In the four years preceding the date of this action, Local 53 had accepted seventy-two first-year improvers (apprentices) as members. Sixty-nine of these were sons or stepsons of members; each of the other three was a nephew who was raised by a member as a son. Only such sons were considered for membership.

42. *Id.* at 1052. The court relied heavily on the reasoning of *Louisiana* and the the district court decision in *Local 189* in holding that the district court was empowered to eliminate the present effects of past discrimination.

43. *Id.* at 1051.

44. *Id.* at 1052-53.

to justify the particular relief ordered by them.[45]

In the second Fifth Circuit case, *Local 189, United Papermakers & Paperworkers v. United States*,[46] job vacancies at the Crown Zellerbach plant were filled on the basis of job seniority—time actually spent on a particular job—rather than mill seniority—total employment time at the plant. Prior to the passage of the 1964 Civil Rights Act, blacks had been relegated to job classifications which were severely limited in terms of advancement opportunities. Because of these inherent limitations in the job classifications, seniority acquired by blacks was virtually meaningless in terms of advancement opportunities. After passage of the act, virtually all of the various job classifications were opened up to blacks; however, the job seniority system remained the same. As a result, even though many positions were technically available to blacks, the job seniority system tended to keep blacks who had been employed prior to the passage of the act in the same segregated job classifications. The unions contended that even though the seniority system had the effect of conditioning future employment opportunities upon a previously determined racial status, the system was itself racially neutral and therefore not in violation of Title VII.[47] The court, however, disagreed and stated that the job seniority system embodied the racially determined effects of a biased past and thus constituted a form of *present* racial discrimination which was therefore within the remedial powers of Title VII.[48] One of the major difficulties with this interpretation of Title VII was clearly noted by the court's observation that "the crux of the problem is how far the employer must go to undo the effects of past discrimination."[49]

The court ordered that the job seniority system be discontinued and a mill seniority system be instituted in its place. The court cited *Vogler* for the proposition that the court was fully empowered to eliminate the present effects of past discrimination in extending Title VII to eliminate an existing seniority system. The court countered the argument that the legislative history indicated the intent to leave existing seniority systems alone[50] by pointing out:

> [T]he treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system."[51]

45. *See, e.g.*, United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

46. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

47. *Id.* at 988.

48. *Id.* at 990.

49. *Id.* at 988.

50. *Id.* at 987 & n.8.

51. *Id.* at 995.

These two cases provide a different approach than that taken in *Dobbins* in that the court circumvented the expressed legislative intent set forth in the Senate debates and relied instead on the vague wording of section 706(g) authorizing "such affirmative relief as may be appropriate," as justification for according affirmative relief for past discrimination. However, the two cases discussed above deal only negatively with the limitations of section 703(j). That is, even though both decisions stated that the relief granted does not violate the prohibitions in the section against granting preferential treatment, no insight is provided as to just what exactly is prohibited by the section.

The Eighth Circuit Court of Appeals followed the lead of the Fifth Circuit in granting affirmative relief to counteract past discrimination in *United States v. Sheet Metal Workers Local 36*.[52] The case differed somewhat from earlier Title VII cases because there were no allegations that the union had discriminated against any specific individual.[53] Prior to 1967, the union had prohibited blacks from joining the union, from taking the journeyman's examination, and from using the union hiring hall.[54] Although the union had ceased these open acts of discrimination in 1967, it continued to accord job referral priorities under a system based on the amount of pre-act work experience under a collective bargaining agreement. Since there had been no black union members during this period it was alleged that the union's referral system carried forward the effects of former discriminatory practices and thus resulted in present and future discrimination in violation of Title VII.[55] The Eighth Circuit ordered that both the referral system and the collective bargaining agreement be modified to eliminate the pre-act work experience requirement and permit minorities who were reasonably qualified to register for employment at the hiring hall and to be placed in the highest referral group for which they were qualified.[56] The court followed the example of *Vogler* and *Local 189* and quickly disposed of any purported limitation imposed by Section 703(j) by declaring "in requiring the modifications, we impose no quotas, we grant no preferences."[57] The court also ordered the union to publicize in the black community that membership and related benefits were open to all regardless of race. As previously discussed,[58] the court in *Dobbins* had theorized that none

52. 416 F.2d 123 (8th Cir. 1969).
53. *Id.* at 132.
54. *Id.* at 131.
55. *Id.*
56. *Id.* at 132.
57. *Id.* at 133.
58. See note 37 *supra*.

of the provisions in the act required such publicity.[59] However, the Eighth Circuit carefully noted that in *Dobbins* the discriminatory acts had ceased prior to July 2, 1965, the effective date of the act, while in *Local 36*, the discriminatory acts continued until 1967.[60] More importantly, the court stated that authority to grant affirmative relief was not limited by section 703(j) of the act.[61] The preference of the court to grant broad equitable relief in spite of the express provisions of the act, thus appeared to be gaining momentum.

The Sixth Circuit followed the growing trend in *United States v. Electrical Workers Local 38*,[62] and granted affirmative relief on the basis that it was necessary to alleviate the continuing effect of the union's past discriminatory practices. When the action alleging discrimination was brought, the union had 1,318 members, two of whom were black; there were also 255 apprentices, three of whom were black. In the immediately preceding year the union had referred 3,487 persons for work in the electrical trades through its hiring hall—only two of the referrals were black. The court found that prior to 1967, the union's referral procedures utilized priorities established according to work experience gained under collective bargaining agreements during a period when there were no blacks in the union. The union also utilized subjective criteria for admitting individuals to the apprenticeship programs, and these criteria had a differential impact upon blacks. Furthermore, the union had a poor reputation in the black community with regard to employment opportunities for blacks, largely because of its past policies. The court ordered the suspension of the referral system, the establishment of objective criteria for admission to the union and its programs, and the publication in the black community of the new nondiscriminatory policies of the union. In ordering this affirmative relief, the court followed the lead of the Fifth and Eighth Circuits and declared:

> When the stated purposes of the Act and the broad affirmative relief authorization [in section 2000e-6] are read in context with with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices.
>
> Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.[63]

59. Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

60. United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 140 (8th Cir. 1969).

61. *Id.*

62. 428 F.2d 144 (6th Cir. 1969), *cert. denied*, 400 U.S. 943 (1970).

63. *Id.* at 149.

The United States Supreme Court has not yet interpreted the relief provisions of Title VII; however, in *Griggs v. Duke Power Co.*[64] the Court considered whether an employer was prohibited under the 1964 Civil Rights Act from requiring a high school education and the passing of a standardized intelligence test as a condition for employment or job transfer.

In holding that the valdity of utilizing such standards depended upon a showing that they reasonably measure job performance, the Court stated that the objective of Congress in enacting Title VII was to

> achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.[65]

The Court further held, however, that the act was not intended to provide racial preferences, but rather was intended to promote hiring on the basis of qualifications without consideration of race.[66] Neither the high school completion requirement nor the general intelligence test was shown to bear a demonstrable relationship to the successful completion of the job and the use of these standards was therefore barred by Title VII. Though the Court did not specifically refer to affirmative relief under the act, there is language in the opinion to the effect that remnants of past discrimination must be eliminated if they control the future availability of employment opportunities.

To summarize, the cases discussed in this section show the development of a theory of "broad equitable power" utilized by the courts to justify affirmative relief for past discriminatory practices. The courts have successively broadened the scope of permissible remedies available for eradicating the remaining effects of past discrimination. This progression of affirmative relief has continued without any hint of limitation, in spite of the language of section 703(j),[67] which has been effectively circumvented by the courts. The affirmative relief recently ordered by the Ninth Circuit under Title VII has expanded this judicial trend to what may appear to be a logical, though not necessarily legal conclusion.

64. 401 U.S. 424 (1971).
65. *Id.* at 429-430.
66. *Id.* at 434.
67. See text accompanying notes 16-21 *supra.*

Ninth Circuit—Affirmative Relief Under Title VII

The Holding

In *United States v. Ironworkers Local 86*[68] the action was originally brought in the United States District Court for the Western District of Washington[69] alleging discriminatory practices, in violation of Title VII by the unions[70] and the joint apprenticeship training committees (JATCs).[71] The alleged discriminatory practices included the following: (1) the utilization of tests and admission criteria which had no relation to any skills required on the job—this was the type of illegal practice alleged in *Griggs*; (2) the active recruitment of whites with little or no publicity in the black community of information regarding procedures for gaining union membership, work referral opportunities, or the operation of apprenticeship training programs—this was the type of illegal practice rectified by the court in *Local 36* and *Local 38*; (3) a nepotistic admission policy by the union—like *Vogler's*; (4) differential application of membership requirements, often waiving such requirements for whites—similar to *Dobbins*; (5) the turning away of qualified black workers seeking job referrals either without reason or with a spurious explanation; and (6) implementation of a referral system which carried forth the effects of past discrimination by giving referral priority according to experience under a collective bargaining agreement when blacks were deterred from gaining such experience[72]—similar to *Local 189*, *Local 36*, and *Local 38*.

The district court placed heavy emphasis on statistical data which showed a large disparity between the racial composition of the unions and the city of Seattle[73] and entered judgment on behalf of the plain-

68. 443 F.2d 544 (9th Cir.), *cert. denied*, 92 S. Ct. 447 (1971).

69. 315 F. Supp. 1202 (W.D. Wash. 1970).

70. Local 86, International Association of Bridge, Structural, and Ornamental Ironworkers; Local 46, International Brotherhood of Electrical Workers; Local 32, United Association of the Plumbing & Pipefitting Industry of the United States; Local 32, International Union of Operating Engineers; Local 99, International Sheet Metal Workers Association.

71. Ironworkers Joint Apprenticeship Training Committee; Plumbers & Pipefitters Joint Apprenticeship and Training Committee; Sheet Metal Workers Joint Apprenticeship and Training Committee.

72. United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir.), *cert. denied*, 92 S. Ct. 447 (1971).

73. Ironworkers Local 86 had approximately 920 members in January 1970, only one of whom was black. 315 F. Supp. at 1204. Sheet Metal Workers Local 99 had approximately 900 members in its construction division, only one of whom was black. *Id.* at 1212. Plumbers & Pipefitters Local 32 had approximately 1900 members in its construction group, only one of whom was black. *Id.* at 1219. Electrical Workers Local 46 had approximately 1750 members in the construction wiremen's unit, two of whom were black. *Id.* at 1228. The Sheet Metal Workers had 100 apprentices indentured, seven of whom were black. *Id.* at 1215. The Plumbers & Pipe-

tiffs and against the unions and the JATCs involved. The court enjoined the unions from future discrimination with respect to job referrals and membership in the union; ordered the dissemination of information in the black community regarding referral opportunities, admission policies, and apprenticeship programs; granted specific relief to certain individuals by ordering immediate job referral; modified the union's job referral system and the criteria for union membership.[74] The court also ordered the JATCs to disperse information throughout the black community concerning the requirements and admission procedures for the apprenticeship programs and to refrain from all future acts of discrimination against blacks.[75]

Most importantly, the court purported to eliminate traces of past discrimination by ordering the creation of special apprenticeship classes for blacks,[76] in addition to ordering the selection of a sufficient number of blacks under the regular apprenticeship programs to overcome the effects of past discrimination.[77] The court set forth guidelines to be utilized by the JATCs for determining the number of blacks to be selected for the apprenticeship programs—a sufficient number to insure a minimum level[78] equal to thirty percent of each class to the extent that there are blacks on the list of qualified apprenticeship applicants. The court anticipated that these guidelines and the special apprenticeship programs, in conjunction with the notification provided the black community concerning employment opportunities in the trades, would create a continuing influx of qualified black workers into the unions and would thus eliminate any traces of the unions' past discriminatory policies.

On appeal, the Ninth Circuit was faced primarily with the issue of whether the lower court had overreached the remedial authority provided for under the act. At the outset, the appellate court sustained the district court's finding that the statistical evidence showed a marked absence of blacks in both the unions and the apprenticeship

fitters had 104 building trades apprentices, none of whom were black. *Id.* at 1224. In the city of Seattle, approximately 42,000 blacks reside, consisting of roughly seven percent of the population. *Id.* at 1234.

74. *Id.* at 1237-44.

75. *Id.* at 1245-52.

76. These special classes were to be designed to meet the special needs of black applicants who had either no previous job experience or skills, or, who may have had some previous experience or skills in the trade which was insufficient to meet the journeyman standards established by the union. *Id.* at 1247.

77. *Id.*

78. "[T]he phrase 'minimum participation of blacks' refers to participation both in the class of persons entering the apprentice program and the class of persons remaining in the program more than three months. Blacks whose apprenticeships terminate in three months or less shall be replaced with newly indentured black apprentices to insure the required participation by blacks." *Id.*

programs.[79] The court further agreed that the absence of blacks was primarily attributable to vestiges of discrimination in the unions' referral systems and the utilization of employment practices which had a differential impact upon blacks.[80]

Following its affirmance of the lower court's finding of fact, the Ninth Circuit concentrated on the unions' contention that the relief granted by the district court violated section 703(j) because the court's orders granted "racial preferences" and imposed "racial quotas." Specifically, the unions objected to giving immediate job referrals to blacks as had been ordered by the court. Further, the unions objected to the court's order to include, under judicially imposed minimums, a sufficient number of black applicants in the apprenticeship programs to overcome *past* discrimination. The court rejected the unions' contentions and held that the district court neither abused its discretion in ordering relief under the act, nor did the orders of the lower court in any way establish a system of racial quotas or preferences.[81]

Ninth Circuit's Authority

In rejecting the unions' contentions that the district court, in creating minimum percentage requirements for participation of blacks in the apprentice programs had exceeded its authority under the act, the Ninth Circuit cited the relief provisions in the act which allows the courts to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate . . . ."[82] Of course, by interpreting the relief provisions in the act in this manner, the court reasoned that there were no *specific* limitations in the act as to the type of relief granted, so long as such relief did not grant preferential treatment. Therefore, relief ordered by the district court was *not specifically* prohibited under the act. The result of this type of interpretation is that there are no objective standards for determining the prermissible scope of the court's discretion in granting affirmative relief.

The court further justified the propriety of the relief granted by the district court with the statement that the

> court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the nonexistence of future barriers to the full enjoyment of equal job opportunities by qualified black workers.[83]

79. United States v. Ironworkers Local 86, 443 F.2d 544, 552-53 (9th Cir.), *cert. denied*, 92 S. Ct. 447 (1971).

80. *Id.* at 552.

81. *Id.* at 554.

82. 443 F.2d at 553. *See* Title VII, § 706(g), 42 U.S.C. § 2000e-5(g) (1970).

83. 443 F.2d at 553.

This broad policy statement has also been utilized by other courts—for example in *Vogler*—to justify modification of the job referral systems, merger of unions, elimination of nepotistic admission policies, revamping of apprenticeship programs, development of objective criteria for union membership, and the granting of specific relief to particular individuals by ordering immediate work referral or union membership.[84] In none of the prior cases, however, was any consideration given to the establishment of minimum percentage quotas for determining the number of minority group individuals to be admitted into the unions' apprenticeship programs, as was approved by the Ninth Circuit in *Local 86*. The Ninth Circuit specifically cited *Vogler* in support of its position that the minimum percentage requirements did not constitute a quota system.[85] Why the court deemed *Vogler* pertinent is not clear because the *Vogler* court ordered the admission of four discriminatees and the development of objective criteria for union membership and size; it did *not* order imposition of any percentage level of blacks to be admitted to the union's apprenticeship programs.

As a last stone in the "wall of authority" cited in support of its decision, the court again referred to the view previously expressed in both *Vogler* and *Local 38* to the effect that the district court was fully empowered to eliminate the *present effects of past discrimination*.[86] To hold otherwise, noted the court, "would allow a complete nullification of the purposes of the Civil Rights Act of 1964."[87]

To summarize, even though *Vogler* and *Local 38*, on which the court so heavily relies, were based upon similar factual situations to that of *Local 86*; in neither case did the court find the necessity nor the desirability of establishing minimum levels of participation in union apprenticeship programs. In *Vogler* the Fifth Circuit eliminated a union's nepotistic admission policies, while in *Local 38* the Sixth Circuit suspended a discriminatory job referral system, established objective union membership criteria, and ordered the publication in the black community of the new nondiscriminatory union policies. The Ninth Circuit was faced with allegations of discriminatory union practices which were factually similar to *Vogler* and *Local 38*, and the court apparently utilized the reasoning of these two prior cases while achieving an entirely different result.

Thus, while the decision of the Ninth Circuit in *Local 86* clearly continues the earlier trend in expanding the available forms of affirma-

84. See text accompanying notes 16-21 *supra*.

85. 443 F.2d at 553-54, *citing* Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969).

86. United States v. Ironworkers Local 86, 443 F.2d 544, 554 (9th Cir.), *cert. denied*, 92 S. Ct. 447 (1971).

87. *Id.*

tive relief under the act, the court appears to have gone significantly further than other courts by establishing percentage requirements for minority participation. The court's reliance upon the general wording of the relief provisions of the act, and the citation of general policy statements uttered by the courts in *Vogler* and *Local 38* would not appear to fully justify the conclusion that the action taken in *Local 86* was well within the scope of affirmative relief granted by the courts in other Title VII cases.

The Proper Use of Statistics Under Title VII

In affirming the lower court's imposition of minimum percentage requirements for minority membership in the union's apprenticeship programs, the Ninth Circuit held that the findings of discriminatory practices were well documented with statistical evidence which showed a distinct absence of blacks in both the unions and the apprenticeship programs. The court also cited a number of cases in which the courts had utilized statistics to prove racial discrimination under Title VII.[88]

Courts have also utilized statistics to substantiate discriminatory practices in such areas as voting[89] and jury selection;[90] however, the racial statistics have been utilized in three different ways: 1) to trigger enforcement action, such as the initiation of investigation; 2) to shift the burden of proof to the party accused of discrimination—making him prove that he has not discriminated; and 3) to formulate specific employment objectives under a decree designed to eliminate traces of past discrimination.[91] The courts which have utilized racial statistics generally point out the extreme care which is necessary in order to prevent the formation of unfounded inferences. For example, the mere existence of a racial imbalance should not serve as the *sole* basis for the finding of an unlawful employment practice by the unions.[92]

In *Local 86* the Ninth Circuit cited the absence or near absence of blacks from the unions and their programs as a "red flag," indicating

88. *Id.* at 550. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935). *See generally* Fiss, *supra* note 7.

89. *See, e.g.*, United States v. Louisiana, 380 U.S. 145 (1964).

90. *See, e.g.*, Carmical v. Craven, 451 F.2d 399 (9th Cir. 1971), *petition for rehearing filed* June 13, 1971.

91. Fiss, *supra* note 7, at 268.

92. There are causes other than racial discrimination that may explain the absence or low numbers of blacks within the unions and the apprenticeship programs. The imbalance might be due to a lack of the requisite skills that are usually necessary to hold a job in the construction trades or it may be due to a lack of interest by blacks resulting from the poor pay and long period of indenture in the apprenticeship programs. *Id.* at 270.

the possibility that the unions had followed unlawful employment practices. As one commentator has noted, the use of racial statistics to trigger enforcement action

> is based on the indisputable proposition that one necessary *consequence* of racial discrimination is racial imbalance. If the employer discriminates against Negroes on the basis of race, there will be no Negroes or very few. This use of racial statistics does not imply that racial discrimination should be reduced to or equated with racial imbalance.[93]

The Ninth Circuit was careful to point out, in rejecting the unions' categorization of such proof as a statistical "numbers game" which was incapable of proving a violation of Title VII,[94] that the statistical evidence was "complementary rather than exclusive."[95] The court explained that the lower court had not relied on statistical data alone as the basis for its findings but had also cited specific instances of discrimination on the part of the unions and the apprenticeship committees. The court went on to explain that the statistical imbalance between the racial composition of the unions and the community merely served to alert the attorney general, who thereupon conducted an investigation and discovered that the statistical imbalance was due to the unlawful employment practices of the unions and apprenticeship committees. Thus, the holding of the court was centered around these specific instances of discrimination and *not* the racial imbalance.[96]

In addition to the fact that the statistical imbalance had been utilized to trigger investigation of the unions and the apprenticeship committees by the attorney general, the statistics were further utilized by the trial court to raise the inference that the imbalance resulted because of racial discrimination. This inference had the effect of shifting the burden of going forward with the evidence and the burden of persuasion to the unions.[97] Courts have justified the use of such an inference on the basis that in many civil rights cases the only "available avenue of proof is the use of racial statistics to uncover clandestine

93. *Id.* at 269-70.

94. 443 F.2d at 550.

95. *Id.* at 551.

96. "[A]s is the case with all statistics, their use is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn. It is our belief that the often-cited aphorism, 'statistics often tell much and Courts listen,' has particular application in Title VII cases." *Id.*

97. *Id. See, e.g.*, United States v. Electrical Workers Local 38, 428 F.2d 144, 151 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); United States v. Hayes, 415 F.2d 1038 (5th Cir. 1969); EEOC v. United Ass'n of Journeymen, 311 F. Supp. 468 (S.D. Ohio 1970).

and covert discrimination by the employer or union involved."[98] Because in many of the cases it is highly improbable that the union can show the cause of the statistical imbalance to have been something other than racial discrimination, the imposition of such an inference by the courts is often determinative of the outcome. Because of the conclusive effect of such an inference, the courts have been reluctant to establish the inference solely on the basis of racial statistics,[99] and generally require not only that other methods of proof be unavailable to the plaintiff,[100] but that the alleged racial discrimination be supported by other evidence.[101] Such evidence may include: (1) consideration of the economic context surrounding the situation;[102] (2) the presence of suspicious circumstances;[103] (3) and the existence of specific instances of racial discrimination.[104] Though the supportive evidence, considered alone, may not be enough to justify the raising of an inference of discriminatory conduct by the unions, when the supportive evidence is viewed in conjunction with all the circumstances including the statistical racial imbalance the utilization of an inference against the unions may be more clearly supported.

In *Local 86*, the Ninth Circuit modified the approach taken by the Eighth Circuit in another Title VII case[105] in which the court had based its finding of an unlawful employment practice in violation of

98. United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 92 S. Ct. 447 (1971).

99. *See generally* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery Bd. of Educ., 395 U.S. 225 (1969); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); Alabama v. United States, 304 F.2d 583 (5th Cir.) *aff'd per curiam*, 371 U.S. 37 (1962).

100. Other methods of proof may be unavailable because: (1) the race of the applicants may be unknown; (2) the employer or union may maintain inadequate records; (3) the cost of maintaining adequate personnel records may be prohibitive; (4) of the utilization of subjective hiring criteria; (5) there may be few black applicants and therefore no means of making a comparison. Fiss, *supra* note 7, at 271.

101. *Id.*

102. In the construction trade unions where the prospect for self regulation on the merit principle has proven to be slim, the existence of a racial imbalance would have some tendency to reinforce the allegation of discrimination on account of this past conduct. *Id.* at 273.

103. For example, such circumstances were present in *Local 86* in that the ironworker's union required black applicants for union membership to possess skill in knot tying. United States v. Ironworkers Local 86, 315 F. Supp. 1202, 1206 (W.D. Wash. 1970).

104. If only one or two specific instances could be shown, however, general injunctive relief might be inappropriate because section 707(a), 42 U.S.C. § 2000e-6 (a), requires a "pattern or practice" of conduct that creates a substantial risk that the discriminatory conduct will recur. Isolated incidents of discrimination, however, lend credibility to the inferences arising from the statistics that the union has pursued a general discriminatory policy. Fiss, *supra* note 7, at 272.

105. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970).

the act *solely* on a statistical showing of an extraordinarily small number of black employees in the offending company. The Ninth Circuit cited the numerous instances of specific acts of discrimination against blacks by both the unions and the apprenticeship committees as the basis for its holding that Title VII had been violated.

After affirming the findings of discrimination, the Ninth Circuit proceeded to review the affirmative measures ordered by the lower court to remedy the existing situation. In affirming the order to the unions to achieve a "minimum level of participation" by blacks in the apprenticeship programs equal to thirty percent of each class, the Ninth Circuit became the first court under Title VII to use statistics to define performance goals.[106]

The author's contention is that the establishment of performance objectives based on statistical representation should be reserved for the exceptional cases where there is little hope of eliminating the vestiges of past discrimination through any other means. As a minimum, the following conditions should be met before such performance objectives are resorted to by the courts: (1) there should be a judicial determination that the union or employer is engaged in an *intentional* pattern or practice of discrimination; (2) other methods of affirmative relief are found to be either impractical or have been previously attempted and have failed to remedy the situation. For example, changes in employment procedures under the watchful eye of the court may be sufficient to accomplish the necessary result.

If despite the above conditions, reliance on performance goals is found to be necessary, the court should establish a periodic hearing procedure in which testimony could be taken to help guide the court's hand in its quest to ascertain the correct employment goal to impose upon the union or employer.[107] Had the above recommendations been implemented by the Ninth Circuit, the court could have eliminated discriminatory practices and also avoided the necessity of circuitous reasoning in attempting to avoid the prohibitions against preferential treatment set forth in section 703(j). Also of significance is the fact that the Ninth Circuit found it unnecessary to fully consider the affirmative relief previously granted by the courts under Title VII—modification of job referral programs; establishment of objective admission criteria for both the unions and the apprenticeship programs; publication in the black community of these new nondiscriminatory policies; elimination of discriminatory and nepotistic admission practices; and

106. The term "goal" is defined in this context in terms of requiring designated percentages of blacks in the union's membership and apprenticeship programs, subject to review by the court. If the union's performance deviates from this goal, it will be "punished," unless it can adequately explain the deviation. Fiss, *supra* note 7, at 273.

107. *Id.* at 274.

active recruitment programs of minorities previously discriminated against. While it is true that the affirmative relief granted in these prior cases[108] has yet been inconclusive insofar as concerns the success or failure in eliminating discrimination, it is also true that the use of statistical goals to eliminate discrimination, as was ordered by the Ninth Circuit, risks violation of the prohibition on the granting of preferential treatment to minorities under section 703(j) of the act. The court's reliance on the general relief provisions set forth in section 706(g) which authorize "such affirmative relief as may be appropriate" could arguably justify the imposition of the statistical performance goals or quotas. However, the court would have been on a surer footing had it waited to impose such statistical goals *after* the failure of earlier court ordered relief. In *Local 86*, however, the Ninth Circuit imposed the statistical goals without first attempting any other types of affirmative relief, thus permitting the inference to be drawn that the basis for the court's action was indeed the statistical racial imbalance.

Another troublesome aspect of the court's imposition of the statistical goals for minority membership is that no specific guidelines were established as to how or when the thirty percent statistical levels were to be achieved. In addition, there were no evidentiary hearings to establish an accurate statistical norm—how many black union members would there have been had there been no discriminatory practices.

There is general recognition that statistical norms are more difficult to determine in the employment area due to the large number of variables which must be taken into consideration[109]—for example, such factors as the skill and ability levels of the blacks within the community, particular job preferences, the alternative job opportunities available at the time, the minority population of the area, geographical boundaries of the labor market, the demand for labor by the industry, and the attrition rate of the unions. Because of the many variables, it would have been appropriate for the court to have conducted a hearing in order to gather testimony of experts as the basis for establish-

108. *See, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965); United States v. Plumbers & Pipefitters Local 73, 314 F. Supp. 160 (S.D. Ind. 1969).

109. In some areas covered by the antidiscrimination prohibition, such as juries and voting, it is relatively easy to construct the statistical norm. It is a function of certain demographic data, namely the percentage of blacks of a certain age in the total population of that age in the community. Thus, in voting, for example, the statistical norm could be constructed from the voting age population; and even if there were literacy tests, a fairly simple index, such as completion of the sixth grade of school, could be used to delineate the relevant racial populations. And such information is easily available in public documents, such as census reports. However, in the employment area it is more difficult to construct the statistical norm for a particular employer. Fiss, *supra* note 7, at 276.

ing a reasonable and just level of minority participation for the unions to meet. In the absence of such a hearing, the thirty percent goal established by the court can only be viewed as an uninformed guess which gives rise to a large chance for error.

> The difficulties inherent in determining the proper statistical norm and the awareness of the cost of an error compel caution, but not the conclusion that all such uses of racial statistics are impermissible. . . . The question should not be one of permitting the use of racial statistics for enforcement purposes but, rather, whether in each case the appropriate conditions are satisfied and whether the statistical norm is accurate.[110]

If the performance goal ignores pertinent employment factors and is merely set equal to the percentage of blacks within the community, there is a strong possibility that the norm will be too high. The pressure on the unions and employers to meet the unrealistic level may result in the admission or hiring of blacks strictly because of their color, which would, in turn, violate merit principles and the basic prohibitions against preferential treatment in Title VII. In other words, when a black is admitted to a union strictly because of his color, a white is being denied an equal employment opportunity.[111]

In *Local 86* the performance goals for black membership were set by the court at thirty percent for each apprenticeship class. This relatively high level would appear to err on the high side;[112] however, this is entirely a matter for conjecture since the court failed to indicate how the thirty percent level was determined. The order by the court

110. *Id.* at 281.

111. *Id.* at 280. A Washington state trial judge recently ruled that the admission preference accorded minority students by the University of Washington's School of Law violated the equal protection clause of the Fourteenth Amendment. The denial of equal protection, the court held, was in the fact that the law school admitted, in pursuance of a policy to make legal education more available to minority groups, several minority applicants having lower predicted first-year averages than the white applicant who challenged his rejection. The court required the school to admit the rejected student.

In an oral decision the trial judge stated, "It seems to me that the law school here wished to achieve greater minority representation and in accomplishing this gave preference to the members of some races. . . . Some minority students were admitted whose college grades and aptitude test scores were so low that had they been whites their applications would have been summarily denied. Excluding Asians, only one minority student out of thirty-one admitted among the applicants had a predicted first-year average above the plaintiff's. Since no more than 150 applicants were to be admitted, the admission of less qualified resulted in a denial of places to those otherwise qualified. The plaintiff and others in this group, have not in my opinion been accorded the equal protection of the law guaranteed by the Fourteenth Amendment." De Funis v. Odegaard, Civil No. 741727 (Super. Ct. of King County, Wash., filed Sept. 22, 1971), *cited in What's New in the Law,* 57 A.B.A.J. 1230, 1233 (1971).

112. See text accompanying notes 76-78 *supra.*

provided that the blacks be selected from the list of "qualified" apprentice applicants; however, no distinction was drawn in the term qualified. It is probable that in order to secure the needed number of blacks to meet the statistical goal, a number of better qualified whites will be denied at least temporarily an apprenticeship opportunity. The blacks near the top of the list would possess comparable qualifications to their white counterparts. However, further down the list the results of an educationally disadvantaged background will begin to become apparent, and if the largest group of black applicants is well down on the list, the union may find it necessary to skip over higher qualified whites in order to fill the thirty percent level established by the court. This brief exposition illustrates the possibility that the court may have unwittingly, or deliberately, injected a reverse racial consideration into the hiring process, something that Title VII was intended to eliminate. In order to correct one evil, the court has created another.

Another potentially detrimental side effect of the court's action is the possible inducement of the employer or union to establish its own "silent" performance goals in order to minimize the risk of becoming the object of an investigation or to avoid being required to rebut an inference of discrimination in court. The unions may admit a number of blacks into the apprenticeship programs on the basis of their color, regardless of their particular skill or aptitude, in order to protect themselves from possible investigation by the attorney general's office. Such subtle action would further obviate the stated purposes—to eliminate racial consideration from the employment process.

The failure of the Ninth Circuit in *Local 86* to provide any indication as to the criteria which were utilized in arriving at the thirty percent performance goals placed upon the apprenticeship committees further adds to the uncertainty surrounding this decision, and leaves subsequent courts to their own imagination in devising such performance goals.

In contrast, the "minority manpower utilization goals" developed in the Philadelphia Plan,[113] and which have been approved by the at-

113. The revised Philadelphia Plan as adopted by the Nixon administration is a significant attempt to pressure construction trade unions and contractors into accepting larger percentages of minority workers by threatening the loss of lucrative government contracts for noncompliance. Where the estimated total cost of the construction project exceeds $500,000, each bidder must, in an affirmative action plan submitted with his bid, set specific goals of "minority manpower utilization" which he or his subcontractor will attempt to meet in performing the contract. These "goals" apply to the sheetmetal, electrical, elevator construction, plumbers and pipefitters, and ironworking trades which have less than two percent union minority group participation in the Philadelphia area. The goals set by the bidder must be at least as high as those set out in the order implementing the plan. The goals vary for each trade and

torney general[114] were carefully devised. The foundation for these goals was based on several specific factors including the disparity in the number of minority workers between the affected crafts and other skilled construction trades; the availability of minority members for employment; the need for, and availability of, training for minority persons at various skill levels; the attrition rate of the current work force; and the projected growth rate of each craft. The implementation of the Philadelphia Plan had been surrounded by a great deal of controversy and at one time, the comptroller general[115] had determined that the plan violated Title VII's prohibition on the granting of racial preferences. Even though the plan has now been approved by the attorney general, the fact that it had been found violative of Title VII in spite of the detailed justification for the various minority employment goals, indicating that the decision in *Local 86* may be subject to criticism. The Ninth Circuit failed to enumerate any criteria upon which it based the thirty percent level established as a performance goal. Though the plan was later approved by the attorney general as not violating Title VII, there are many distinctions between the plan requirements and the goals set forth in the court's decree in *Local 86*. The Philadelphia Plan is in a sense voluntary, because it applies only to contractors seeking federal construction contracts; the order issued in *Local 86* is mandatory. Also, the guidelines or goals established under the plan are relaxed if a "good faith effort" by the contractor fails to recruit the desired number of qualified workers. In *Local 86* the unions have no choice but to comply with the arbitrary performance goals or be held in contempt. The attorney general's approval of the plan was centered around the voluntariness of the guidelines, in that they affected only contractors who bid successfully on a government contract. Even though there are significant distinctions between the Philadelphia Plan and the circumstances of *Local 86*, the court might have benefited by utilizing criteria similar to those in the plan in establishing the performance goals for the union. Had this been

range from four to five percent in the first year to as high as twenty-two to twenty-six percent in the fourth year. *See* 42 OP. ATT'Y GEN. No. 37 (1969); *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROB. 187 (1970); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965).

114. "It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria." 42 OP. ATT'Y GEN. No. 37, at 7 (1969).

115. *Id.* at 4.

done, much of the conjecture concerning the "minimum levels of participation" enunciated by the court could have been eliminated.

In summary, the entire opinion in *Local 86* creates more doubt and confusion as to the scope of Title VII than it solves. The court's order provides that the blacks necessary to fulfill the thirty percent level are to be selected from the list of qualified apprentice applicants; yet, the court does not indicate the consequences should the list not contain sufficient blacks to meet this requirement. Further, the court gives no hint as to how long the union will be subject to these performance goals. That is, will the union be presumed to be discriminating until the black union membership reaches the thirty percent level, or just until the apprenticeship programs are training a "sufficient" number of blacks.

Conclusion

The result ordered by the Ninth Circuit in *Local 86* significantly expanded the available kinds of affirmative relief under Title VII, and despite the court's disclaimer, such relief appears to accord preferential treatment to blacks, in violation of section 703(j) of the act. While, under proper circumstances, it may be entirely proper to require the unions to take the initiative in insuring that the present or past discriminatory practices do not impede equal employment opportunities, such requirements should be remedial in concept.[116] The heartbeat of such a concept should be a policy of developing programs which provide specific steps guaranteeing equal employment opportunities keyed to the specific problems and needs of those who have been discriminated against. When such discrimination is noted, goals and timetables should be developed for the prompt achievement of full and equal employment opportunities.[117] Care should be exercised in the development of such goals, however, to insure that they do not involve racial preferences, which would violate section 703(j) of the act. Instead the goal should be to provide employment opportunities solely on the basis of qualifications without regard to race. In *Local 86* the Ninth Circuit appears to have injected a reverse racial consideration into the hiring process by virtue of the thirty percent minority participation requirements. Even though the imposition of arbitrary percentage requirements have the advantage of ease of application, such relief tends to oversimplify the problem and will ultimately require further judicial action when the variables come into play. In formulating relief under Title VII, courts should be mindful of all the interests in-

116. Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 366 (1970).

117. Contractors Ass'n v. Schultz, 311 F. Supp. 1002 (E.D. Pa. 1970).

volved and should avoid over reaction which may be as violative of Title VII as the alleged discriminatory practices sought to be corrected. Only through thoughtful formulation of meaningful guidelines, based on thorough evidence, will the courts fulfill the basic purposes of the 1964 Civil Rights Act to achieve equal employment opportunities in America.

*John B. Weldon, Jr.**

---

* Member, Second Year Class.